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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALLEN TREMEL TALLEY, Defendant and Appellant.	B213331 (Los Angeles County Super. Ct. No. TA088856)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Joanie P. Chen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

Allen Tremel Talley appeals from the judgment entered following his conviction by a jury on one count of robbery with a true finding on the special allegation he had personally used a gun in committing the robbery. Talley contends the trial court erred in denying his *Wheeler*[1] motions alleging the prosecutor had discriminated against African Americans in exercising peremptory challenges during jury selection. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Around 4:30 p.m. on May 1, 2006, four young African-American men surrounded Marcos Cervantes, a repairman who was walking back to his car near a housing project in south Los Angeles. According to Cervantes, one of the young men pressed a small silver gun to Cervantes's left temple and demanded money. When Cervantes denied having his wallet, the men frisked his pockets and grabbed his wallet, which contained about $280 in cash; Cervantes's driver's license and social security card; credits cards; and photographs. After taking the wallet, the four men ran toward Imperial Highway. As they ran, Cervantes watched them passing his wallet back and forth.

Half an hour later, a Los Angeles County Sheriff's deputy noticed Talley, who was then 16 years old, standing on the Union Pacific train tracks and asked him for his identification. Talley at first denied having any identification but then pulled out a driver's license that had a photograph of a Hispanic man. The deputy detained Talley and searched him. Talley was carrying Cervantes's driver's license, social security card and bank cards. In addition, he had approximately $52 in cash. Cervantes was brought to the location and identified Talley as the person who had pointed a gun at him during the robbery.

Talley was charged with second degree robbery in violation of Penal Code section 211.[2] The information additionally alleged Talley had personally used a firearm within the meaning of section 12022.53, subdivision (b). During jury selection the defense raised three *Wheeler* challenges in succession after the prosecutor challenged a second

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1 *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

2 Statutory references are to the Penal Code.

African-American potential juror and then a third and a fourth African-American potential juror. As to each challenge, the trial court ruled the defense had failed to make a prima facie case of racial discrimination by the prosecutor.

The jury convicted Talley of second degree robbery and found true the firearm-use allegation. He was sentenced to an aggregate state prison term of 12 years.

DISCUSSION

1. *The Trial Court Did Not Err in Rejecting Talley's Claim of Racially Biased Jury Selection*

   a. *Governing law*

The exercise of peremptory challenges to remove prospective jurors based on group bias violates both the California and the United States Constitutions. (*People v. Ward* (2005) 36 Cal.4th 186, 200, citing *Wheeler, supra,* 22 Cal.3d at pp. 276-277 and *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69].) The procedure and substantive standards trial courts properly use when considering motions challenging peremptory strikes are now well-established: """"First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination"""" (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 476-477 [128 S.Ct. 1203, 1207, 170 L.Ed.2d 175, 181] (*Snyder*).)

"[A] defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170 [125 S.Ct. 2410, 162 L.Ed.2d 129]; accord, *People v. Hawthorne* (2009) 46 Cal.4th 67, 79.) "An inference is a logical conclusion based on a set of facts. [Citation.] When the trial court concludes that a defendant has failed to make a prima facie case, we review the voir dire of the challenged jurors to determine whether the totality of the relevant facts supports an

inference of discrimination."[3] (*People v. Lancaster* (2007) 41 Cal.4th 50, 74, citing *Johnson*, at p. 168 & fn. 4.)

As always, "'[w]e review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'" (*People v. Lenix* (2008) 44 Cal.4th 602, 613-614 (*Lenix*).) If the record """"suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.""" (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 501; see *People v. Bonilla* (2007) 41 Cal.4th 313, 341 ["we review the trial court's denial of a *Wheeler/Batson* motion deferentially, considering only whether substantial evidence supports its conclusions"] (*Bonilla*).) "On appeal, a trial

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[3] Trial courts are encouraged "to ask prosecutors to give explanations for contested peremptory challenges, even in the absence of a prima facie showing." (*People v. Howard* (2008) 42 Cal.4th 1000, 1020.) Explanations may be helpful on appeal because, if the appellate court disagrees with the trial court and finds a prima facie case was established, an appellate record exists for third-stage review. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13.) When a trial court expressly finds no prima facie case, but then invites the prosecution to justify its peremptory challenges, the prima facie point is not mooted as long as the trial court does not rule on the legitimacy of the prosecutor's reasons. In that situation, we independently review the record to determine whether, under the totality of the circumstances, the facts give rise to the prima facie inference of discriminatory purpose. (Compare *Howard*, at p. 1018 [question whether prima facie case had been made is not mooted] with *People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8 [when trial court requests "the prosecutor's reasons for the peremptory challenges and ruled on the ultimate question of intentional discrimination, . . . the question of whether defendant established a prima facie case is moot"].)

Here, the trial court invited the prosecutor to place the rationale for her challenges on the record but made no finding other than the defense had failed on each occasion to establish a prima facie case of discrimination.

court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 477.)[4]

b. *The facts underlying the Wheeler motions*

The first *Wheeler* motion was made after the prosecutor had challenged two African-American women, Juror Nos. 0726 and 9948. After finding a lack of prima facie evidence to support the challenge, the court invited the prosecutor to state her reasons for the record. The prosecutor cited Juror No. 0726's response to a question she had posed, "Could you think of a reason why somebody wouldn't have . . . a weapon used [in a crime] at the time they were contacted by police?" Juror No. 0726 had answered, "Maybe they weren't involved in the crime or he didn't belong there." The prosecutor construed this answer as favoring the defense, because Juror No. 0726 failed to suggest the suspect had not thrown the gun away as another juror had hypothesized. With respect to Juror No. 9948, the prosecutor claimed the potential juror had made noises with her mouth ("lipsmacking"), which the prosecutor (as well as others seated nearby) had found "disruptive."[5] Defense counsel vigorously protested the prosecutor's description of Juror No. 9948, but the court declined to alter its previous ruling.

The second *Wheeler* motion was made after the prosecutor challenged Juror No. 2057, also an African-American woman. When the court had questioned her about her occupation, she had requested a sidebar conference. During that colloquy, Juror No. 2057 disclosed she had worked for more than 20 years as a civilian employee in the

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[4] The California Supreme Court has held that the "substantial evidence" standard for review of pure issues of fact is equivalent to the federal "clearly erroneous" standard. (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 901, fn. 11.)

[5] The prosecutor stated, "My reason for excusing her is actually, your Honor, I could barely even stand it up to this point having her [in the venire]. I don't know if you could hear her, from the entire time she was very disruptive to me. I actually saw the person sitting in front of her look back a couple of times. And I looked back a couple times. Continuously smacking her lips. . . . It was disruptive to me, and I think it's disruptive to me when I'm sitting 15 feet away from her. . . . [I]f it was disruptive to me, then it would be disruptive to the jurors . . . around her. . . . For the record, I wasn't even sure if she was African American because she was fair-skinned . . . ."

Long Beach Police Department. Further, she had witnessed a Long Beach police officer assault a citizen years ago, before she went to work for the department. She also disclosed she knew many police officers and was currently in a relationship with a robbery detective. When asked if this might not be an appropriate case for her in light of her boyfriend's occupation, she answered, "Yes." Juror No. 2057 then stated, "I could judge fairly. But just having been around law enforcement for so long, . . . in my opinion, there are certain words that are catch phrases that you could just read between the lines and know that there was something more to it. So I would have to see, you know." She also acknowledged she had several relatives who had been in jail for robbery and drug offenses and who had been treated fairly in some instances and unfairly in others. Asked by defense counsel if she would be able, based on her extensive contact with police officers, to question their credibility or "call [them] a liar," she answered she "would listen to what they have to say" and would be able to say she thought they were lying. When the prosecutor challenged Juror No. 2057, the court again found no prima facie case had been made and invited the prosecutor to state the reason for her challenge. When the prosecutor declined to do so, the court stated, "There were plenty of things she said that would in my mind be good reason because of things that she observed in her past . . . ."

The final *Wheeler* motion followed the prosecutor's challenge of a fourth African-American potential juror, Juror No. 7184, who was employed as the dean of students at a local college. Juror No. 7184, whose brother had committed several felonies and was then incarcerated, likened his job to the "campus bad guy," in charge of disciplining students. Asked whether he would be willing to follow the law as instructed by the court, he answered, "I think it just depends. I think we have a responsibility to understand the spirit of the law as well." Although the prosecutor had earlier accepted a panel including this juror, when defense counsel challenged other jurors and the venire reshuffled, she asserted a peremptory challenge to Juror No. 7184. Following the defense's third *Wheeler* motion, the court stated that, during the morning's proceedings, it had noticed Juror No. 7184 had not been paying attention: "He had his [cellphone] out, and he was—

I don't know what he was doing with it, but that caught my eye." The court again found no prima facie case had been made and offered the prosecutor the opportunity to state her reasons for the record. The prosecutor responded, "I also did notice that Juror No. [7184] was playing with a phone this morning. [He] is an associate dean of students . . . . And in thinking about it this weekend, being that the defendant is so young and that this juror decides the fate and punishment for young people every single day, I don't think that from the prosecution he's somebody that I want sitting on the jury." Again, defense counsel protested vigorously, accused the prosecutor of "blatantly using race as a factor." The court answered, "And that I totally disagree with."

c. *The trial court did not clearly err in finding Talley had failed to establish a prima facie case of discrimination*

As explained above, "the burden rests on the defendant to '"show that the totality of the relevant facts gives rise to an inference of discriminatory purpose."' [Citations.] . . . [¶] . . . [A] prima facie burden is simply to 'produc[e] evidence sufficient to permit the trial judge to draw an inference' of discrimination." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1292, 1293; accord, *People v. Neuman* (2009) 176 Cal.App.4th 571, 579.)

Talley contends the prosecutor's exercise of four of the initial seven peremptories she used to challenge African-American potential jurors demonstrates a pattern of discrimination. Although "exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal" (*People v. Silva* (2001) 25 Cal.4th 345, 386), a *Wheeler* inquiry often focuses on situations in which "a discriminatory pattern begins to emerge." (*People v. Motton* (1985) 39 Cal.3d 596, 604; see *Bonilla, supra,* 41 Cal.4th at p. 343, fn. 12 ["'in drawing an inference of discrimination from the fact one party has excused "most or all" members of a cognizable group' . . . 'a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges'"].) Moreover, as the Supreme Court has recognized, a discriminatory motive is more easily inferred if the defendant and the dismissed juror or jurors are from the same ethnic or racial group. (See, e.g., *Bonilla,* at

p. 343 [noting defendant was not same race as challenged jurors]; *Wheeler, supra,* 22 Cal.3d at pp. 280-281.)

Without question, four of seven is a proportion that supports an inference of discrimination. It is also relevant that Talley himself is African American and his victim is Hispanic.[6] It was Talley's burden, however, to make as complete a record as possible in the trial court as a first step in establishing a prima facie case. (*People v. Farnam* (2002) 28 Cal.4th 107, 134-135.) Talley has made it difficult for us as a reviewing court to determine whether the trial court clearly erred in finding he had failed to establish a prima facie case because he has provided no information about how many African Americans appeared in the venire or how many remained on the jury at the conclusion of voir dire. Talley also has failed to identify whether the jury as ultimately impaneled included a significant number of persons of Hispanic descent.[7] Without some context, these raw numbers lose their potency as an indicator of discrimination. (See *People v. Neuman*, *supra*, 176 Cal.App.4th at p. 582 ["defendant's assertion that the prosecutor exercised 75 percent of his peremptories against members of a cognizable class freezes the record at the time of the motion, ignores everything that happened thereafter (which cannot now be reconstructed, thanks to defendant's failure to make a record below) and flies in the face of the rule that we examine the *entire* record"]; *People v. Avila* (2006) 38 Cal.4th 491, 555 [fact that several African-American prospective jurors were in the venire at the time the only African American in the jury box was peremptorily excused by the prosecutor supports the trial court's finding of no prima facie case.].)

Thus, while statistics may play a significant role in establishing a prima facie case of discrimination, the trial court is permitted to consider a much wider range of factors, not only by drawing upon its contemporaneous observations of the venire and voir dire,

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[6] The fact a defendant's alleged victim is a member of the group to which the majority of the remaining jurors belong may also support an inference of discrimination. (See *People v. Bell* (2007) 40 Cal.4th 582, 597.)

[7] Like defense counsel's motions, the prosecutor's *Wheeler* motion, brought after defense counsel challenged a third Hispanic prospective juror, was denied by the trial court for lack of a prima facie case.

but also by considering the prosecutor's demeanor, how reasonable or improbable the reasons are and whether they have some basis in trial strategy, the court's own experiences as a lawyer and bench officer, and "even the common practices of the advocate and the office who employs him or her." (*Lenix*, *supra*, 44 Cal.4th at p. 613; see *People v. Howard* (2008) 42 Cal.4th 1000, 1017-1019; *People v. Hoyos* (2007) 41 Cal.4th 872, 901-902; *Bonilla, supra,* 41 Cal.4th at p. 343.) When a trial court has based its decision on a much broader array of factors, as this court did, it is insufficient on review for a defendant to rely solely on the racial pattern of peremptory challenges in making a prima facie case. (E.g., *Hoyos*, at p. 901 [fact that prosecutor excused all members of a particular group "alone is not conclusive"]; *People v. Kelly* (2007) 42 Cal.4th 763, 780 [prima facie case weakened where prosecutor left some members of minority group on jury].)

Reviewing the totality of circumstances as we must, there was substantial evidence to support the trial court's denial of the motions. With respect to two of the challenged jurors, the trial court independently identified reasons that would support exercise of a peremptory challenge. For instance, when defense counsel requested a sidebar to make her third *Wheeler* motion, the court, fully anticipating the challenge, noted Juror No. 7184 had been using his cellphone rather than paying attention to the proceedings. That alone would have been a sufficient, race-neutral justification to exercise a challenge. (See, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903, 925-926 [prospective juror properly excused for inattention to proceedings].) Acknowledging she too had seen Juror No. 7184 using his cellphone, the prosecutor offered an additional ground for her challenge, stating she had reconsidered his role on the jury over the weekend and concluded his job as an associate dean of students, which required him to make disciplinary decisions about students of approximately the same age as Talley, might lead him to be more sympathetic to Talley than other jurors. Indeed, asked if he could follow the court's instructions on the law applicable to the case, Juror No. 7184 had acknowledged he believed those instructions must be reconciled with "the spirit of the law." A prosecutor's perception that a prospective juror's comments reflect a possible pro-defense bias has repeatedly

been held sufficient to defeat a *Wheeler* motion. (See, e.g., *Reynoso,* at p. 923, fn. 5 [prosecutor had race-neutral explanation for excusing prospective juror who was a counselor for at-risk youth and, therefore, might have sympathy for defendants]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791 [educational background in psychiatry or psychology or employment in similar profession was race-neutral explanation for exercise of peremptory challenge]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 411-412 [peremptory exercised against potential juror with experience in social services proper race-neutral reason].)

As to Juror No. 2057, the subject of Talley's second *Wheeler* motion, the trial court, after the prosecutor declined the opportunity to state her rationale for the record, observed there were "plenty of things" Juror No. 2057 had said about her past experience with police officers that would justify the peremptory challenge. We agree. Juror No. 2057 gave ambiguous and noncommittal answers to questions posed to her about her ability to put aside her past experiences with police officers and admitted she would likely speculate or read additional meaning into their statements based on the language they used in describing events. We cannot discount the prosecutor's assessment of a prospective juror's lingering biases. (See, e.g., *People v. Jordan* (2006) 146 Cal.App.4th 232, 257 [prosecutor not required to believe juror's assertion that she could set aside her feelings about the police department]; *People v. Hamilton, supra,* 45 Cal.4th at pp. 901-902 [African-American prospective juror's concern that African Americans are not fairly treated in the criminal justice system was a race-neutral reason for challenge].) Accordingly, with respect to the second and third *Wheeler* motions, the trial court's findings of no prima facie case of racial discrimination by the prosecutor were supported by substantial evidence and, therefore, not clearly erroneous.

In denying Talley's initial *Wheeler* motion the trial court made no comment other than its finding the defense had failed to establish a prima facie case of discrimination. The motion followed the prosecutor's exercise of her third peremptory challenge, directed to Juror No. 9948, already having challenged Juror No. 0726. The prosecutor justified her challenge to Juror No. 0726 based on that juror's answer to a hypothetical

question concerning reasons a suspect might not have the weapon he supposedly used in committing a crime. Juror No. 0726 responded that the alleged suspect might not have been the person who actually committed the crime. While eminently fair, especially in light of previous questions reminding the venire members of the presumption of innocence, the prosecutor viewed this response as pro-defense, an inference that amply justifies the strike. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 944-945 ["sympathetic or prodefense bias[]" is a race-neutral reason]; *People v. Lancaster, supra,* 41 Cal.4th at p. 76 ["[a] tendency toward equivocation" may be legitimately found objectionable by a prosecutor].)

The prosecutor offered a different kind of rationale in support of her peremptory challenge to Juror No. 9998. According to the prosecutor, Juror No. 9998 had been nodding her head and making sounds to reflect her feelings about the ongoing voir dire. The prosecutor believed that behavior was disruptive, as she herself had been distracted by Juror No. 9998 and had seen another prospective juror turn around in response to noises made by that juror. The trial court made no finding as to whether the prosecutor had accurately described Juror No. 9998's conduct but stated, "I have no quarrel with what you've said," before offering defense counsel an opportunity to respond. Defense counsel insisted the prosecutor's description was inaccurate but, in answering, acknowledged Juror No. 9998 had been shaking her head back and forth. The conceded fact Juror No. 9998 had been shaking her head in response to the discussion among counsel, the court and other prospective jurors is sufficient to justify the prosecutor's use of a peremptory challenge. (See, e.g., *Lenix, supra,* 44 Cal.4th at p. 613 ["prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons"]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1219 [trivial reasons such as "body language" and "mode of answering questions" legitimate grounds "so long as asserted in good faith"].)

In sum, although we are troubled by the prosecutor's exercise of four of her first seven peremptories to challenge African-American prospective jurors, there appears to have been sufficient evidence of race-neutral grounds for those challenges to support the

trial court's findings Talley failed to establish a prima facie case of racial discrimination infecting the peremptory challenges exercised by the prosecutor.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.